Date: December 23, 1996

Case No.: 95-INA-125

In the Matter of:

FAMILY LIQUORS & GROCERY,
Employer

On Behalf Of:

ALBERTO VARGAS,
Alien

Appearance: Henry A. Tesoroni, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On July 23, 1993, Family Liquors & Grocery ("Employer") filed an application for labor certification to enable Alberto Vargas ("Alien") to fill the position of Manager, Grocery (AF 6-7). The job duties for the position are:

> Manage all aspects of retail store which sells groceries, meats, poultry and liquors. Merchandise items; purchase from wholesalers; hire and fire personnel; train new workers; maintain time and attendance records; handle customer complaints; maintain inventory control.

The requirements for the position are three years of experience in the job offered or three years experience as an Assistant Manager, Grocery Store. Other Special Requirements are "[m]ust speak Spanish."

The Employer amended the application on October 20, 1993, to reflect the wage of $12.88 per hour, with overtime paid at $19.32 per hour (AF 13-15).

The CO issued a Notice of Findings on May 26, 1994 (AF 47-50), proposing to deny certification on the grounds that the Employer is in violation of §§ 656.21(b)(6) and 656.20(c)(8), as the Employer has identified no reason to dispute the qualifications of U.S. applicant George M. Orbe, yet placed the burden of employment verification on Mr. Orbe. The CO found this to be "an onerous expectation. Customary recruitment policy accepts the practice of reference checking as an employer, not applicant responsibility ...." The CO further stated that Mr. Orbe "warranted further, direct consideration leading toward a job offer without preoccupation with his obtaining reference letters." The CO determined that the Employer's requirement that Mr. Orbe obtain his own letters of reference could "easily have a chilling effect that discouraged further interest on his part." Further, the CO determined that the Employer must document that his actions do not constitute a "rejection absent basis in lawful and job-related reasons, per objections taken in preceding, of a candidate whose qualifications are not in dispute." Additionally, the CO found that the placement of the advertisements for this position were not placed where the most

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

number of potential prospects for the job would be likely to search; *i.e.*, the ad was placed under "L" for Liquor and Grocery Manager, instead of "M" for Manager, Liquor and Grocery Store.[2]

Accordingly, the Employer was notified that it had until June 30, 1994, to rebut the findings or to cure the defects noted.

In its rebuttal, dated June 6, 1994 (AF 51-60), Counsel for the Employer argued that an employer may request an applicant to submit verification of his/her employment history and educational background and may reject said applicant based on his/her failure to provide such verification, citing *Al-Ghazali School*, 88-INA-347 (May 31, 1989); *Sunee Kim's Enterprises*, 87-INA-713 (July 22, 1988); and, *Rodrigues Painting*, 89-INA-368 (Jan. 25, 1991). In regard to the newspaper advertisement for the position, Counsel argued that the Employer submitted a draft of the ad to the local office which read "Manager, Grocery" which the local office changed to read "Liquors & Grocery Manager." He stated that the Employer complied with the local office's instructions and placed the ad under "L," and argued that the CO must consider a rebuttal argument that the Employer was mislead by the local office; and the CO may be required to provide a reasonable explanation for a departure from the local office's finding, citing *Sverdrup Technology, Inc.*, 88-INA-310 (Mar. 27, 1990); *Peking Gourmet*, 88-INA-323 (May 11, 1989). Counsel concluded that, "[w]ith respect to the issue of employer's requirement that the applicant present written references you relied on the local office's position; yet, here with respect to the wording of the title of an ad you summarily dismiss the policy of the local office."

The CO issued the Final Determination on June 30, 1994 (AF 61-64), denying certification because the Employer remains in violation of §§ 656.24(b)(2)(ii), 656.21(b)(6), 656.20(c)(8), and 656.24(b)(2)(i). The CO stated that the Employer's rejection of U.S. applicant George M. Orbe is indicative of a lack of good-faith recruitment effort, and the rebuttal as to this issue is not accepted. In regard to the newspaper advertisement, the CO asserted that the CO has the authority to require further recruitment "notwithstanding local office's instructions," and that, on review, the CO found the need to implement this authority to representatively test the labor market. The CO stated that the Employer's continued reliance on the local office's instructions with regard to the advertisement is not acceptable and the Employer has been unable to demonstrate that the advisory advanced by the local office regarding ad placement is policy. Finally, the CO stated that a local office's opinion is deemed highly relevant given its placement service frame of reference, and is contributive to the findings in the NOF, but is not the exclusive basis for the position taken.

On July 26, 1994, the Employer requested review of the Denial of Labor Certification (AF 65-88). On November 18, 1994, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). On May 1, 1996, an Order was issued allowing the Employer 30 days to file a statement of intent to proceed and a current address for the Alien. On May 16, 1996, Counsel for the Employer responded to this Order that the Employer wishes to pursue this matter and listed a current address for the Alien.

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[2] The CO asserted that this was a violation of § 656.24(b)(2)(i); however, in a memo to the file dated September 22, 1994, the CO noted that this should be cited as 656.21(g) (AF 93).

Discussion

The CO in this case denied labor certification on two grounds. First, she found that the Employer did not put forth a good-faith recruitment effort because it required a qualified applicant to collect letters of reference; and, second, the CO denied labor certification because the Employer did not adequately advertise the job opportunity.

With regard to the first basis for denial, we note that the Employer interviewed the applicant and then instructed him to send letters confirming his stated employment which formed the basis for his qualifications. Apparently the CO considered the practice of an employer requiring an applicant to submit verification of prior employment, as opposed to the employer obtaining such proof from the prior employer, to be a "prohibitive recruitment practice introduced by employer, one that could have a chilling effect and thus serve to discourage applicant's interest." (AF 63). We disagree.

As the Employer correctly pointed out in its rebuttal, it is well settled that an employer may request verification of employment history and educational credentials, and may reject an applicant based on failure to provide such verification. *Al-Ghazali School*, 88-INA-347 (May 31, 1989); *Sunee Kim's Enterprises*, 87-INA-713 (July 22, 1988). For example, one panel held that an employer may properly reject a seemingly qualified U.S. applicant prior to conducting an interview where it requested employment verification from the applicant but "no expression of effort or intent to obtain such verification" was offered to the employer. *Shinryo Midwest, Inc.*, 90-INA-571 (Jan. 31, 1992). However, an employer may not place unnecessary burdens on the recruitment process. Thus, another panel concluded, in a case where employer contacted applicant almost a month after receiving her resume and then asked her to submit her portfolio before an interview could be scheduled, and where the CO had raised this issue and employer had failed to provide any evidence to the contrary, the employer's request for a portfolio and references prior to an interview of a seemingly qualified applicant was "unusual" and "dilatory" and had the effect of discouraging applicants. See *Berg & Brown, Inc.*, 90-INA-481 (Dec. 26, 1991).

There is no evidence that the Employer's request was dilatory here, as he had already interviewed the applicant. Further, we do not find this particular request to be onerous as it involved just one previous place of employment, One Way Liquor Store (AF 33). Moreover, when the applicant did not follow up on this request, the Employer attempted to contact him by letter; however, the applicant had moved and the letter was returned (AF 38). Therefore, we find that the Employer in this case acted lawfully by timely requesting that the applicant confirm his previous employment from just one employer.

With regard to the second basis for denial, the CO also denied labor certification because the Employer did not adequately advertise the job opportunity. Fundamental to the recruitment effort is an advertisement in a newspaper or other publication, whichever is appropriate to the occupation and is most likely to attract responses from able, willing, qualified, and available U.S. workers. §§ 656.21(g)(1)-(9), 656.21(h)-(j). Although § 656.21(g)(1) through (9) does not explicitly impose a "good faith" requirement with regard to advertising, the regulations would be

stripped of their purpose if a "good faith" requirement were not implied. See *H.C. LaMarche Ent., Inc.*, 87-INA-607 (Oct. 27, 1988) (*en banc).*[3]

The employer must advertise the job opportunity in a newspaper of general circulation or in a professional, trade, or ethnic publication, whichever is appropriate to the occupation and most likely to bring responses from able, willing, qualified, and available U.S. workers. § 656.21(g). If a job advertisement appears outside of a publication's employment section, the goal of § 656.21(g) "to place the ad where it is 'most likely to bring responses'," may be frustrated. The result is the same whether or not the employer controls the section placement of the ad. See *Wailua Associates,* 88-INA-533 (June 14, 1989) (ad appeared between two legal notices and next to "Tickets for Sale or Wanted"). The CO is authorized to require further recruitment if he or she finds that such recruitment could produce additional qualified job applicants." *In re Intel Corp.*, 87-INA-570 (Dec. 11, 1987); *Peking Gourmet,* 88-INA-323 (May 11, 1989). However, "the CO should not require additional advertising or recruiting without offering a reasonable explanation of why the employer's advertisements and/or recruitment were inadequate and how the additional recruitment recommended by the CO would be appropriate." *Id.*

In a similar case, an ad was placed in a section of the newspaper under the heading of "General Help," which the CO found was not descriptive of the job duties. The CO determined that the heading of "Electrician Helper, Automotive," would have been most likely to attract responses from qualified U.S. applicants. A panel agreed with the CO and found that this was a reasonable determination. *Quality Rebuilders Corp.,* 93-INA-141, 93-INA-144, 93-INA-145 (June 28, 1994).

In this case, the Employer was advised by the local job service to publish the required ad under the heading "Liquors and Grocery Manager," situated alphabetically in the "L" listings of the classified ads. In the NOF, the CO found that this advertisement was inadequate as it did not appeal to the widest number of qualified U.S. applicants. The CO informed the Employer that the advertisement should be under the heading "Manager, Liquor and Grocery Store." Therefore, the CO instructed the Employer that it must readvertise under the new heading. The Employer was also given the option of refuting this suggestion in rebuttal.

The Employer chose not to readvertise under the suggested heading and, instead, attempted to refute the CO's position in rebuttal. The Employer first stated that it complied with the local office's instructions, but then it acknowledged that the CO is not bound by local office errors. The Employer also argued that the CO did not provide a reasoned explanation for the proposed advertisement as required by *Peking Gourmet, supra* (AF 57). We disagree.

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[3] We note that the CO, in the NOF and the FD, incorrectly cited to § 656.24(b)(2)(ii). The proper cite should have been § 656.21(g). In a similar case, the CO cited § 656.24(b)(2)(ii) instead of § 656.21(b)(7), but the NOF clearly placed the employer on notice of the basis for the denial and, therefore, the error was deemed harmless. *Liaison Center of the General Chamber of Commerce of the Republic of China,* 90-INA-140 (Apr. 29, 1991). Similarly, based on the Employer's treatment of this issue on rebuttal, we find that it was provided sufficient notice. Accordingly, we find that the error is harmless.

In the NOF, the CO clearly explained that readvertisement under the new heading was necessary because the Employer's advertisement did not target the widest number of potential prospects for the job. The CO further explained that qualified and interested applicants satisfying the Employer's requirements, or otherwise having qualifying backgrounds, would be more likely to search a classified ad listing under "Manager, Liquor and Grocery Store" (AF 52). Finally, the CO noted that this is an especially valid observation given the Employer's willingness to accept Assistant Manager, Grocery Store experience in lieu of experience in the job.

We find that the CO's explanation for the new listing is reasonable and, as such, the Employer has not sufficiently rebutted the CO's determination that the Employer's advertisement is inadequate. Furthermore, the Employer's failure to accept the CO's offer to allow readvertisement demonstrates a lack of good-faith recruitment. Therefore, we find that the Employer has not recruited in a manner most likely to attract responses from able, willing, qualified, and available U.S. workers. Accordingly, the CO's denial of labor certification is hereby AFFIRMED.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the _____ day of December, 1996, for the Panel.

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the

petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.